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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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MAY 21 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	IB Docket No. 95-41
Preemption of Local Zoning Regulation	)	DA 91-577
of Satellite Earth Stations	)	45-DSS-MISC-93

**OPPOSITION OF GE AMERICAN COMMUNICATIONS, INC.**

GE American Communications, Inc. ("GE Americom"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby opposes certain petitions for reconsideration of the Commission's Order in the above-captioned proceeding, FCC 96-78 (released March 11, 1996) (hereinafter, "Order").<sup>1</sup>

In the Order, the Commission revised Section 25.104 of its Rules, 47 C.F.R. § 25.104, to strengthen the preemption of local government regulation of satellite antennas. Petitioners argue that the Commission exceeded its authority and ignored legitimate local interests in adopting the modified rule. The Commission, however, properly considered and rejected challenges to the legality and wisdom of new Section 25.104. Petitioners' objections to the rule lack merit and should be rejected.

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<sup>1</sup> Specifically, GE Americom opposes the reconsideration petitions filed by the National League of Cities, et al. ("National League"); the City of Dallas, Texas, et al. ("Dallas"); the County of Boulder, Colorado ("Boulder County"); and the Florida League of Cities ("Florida League") (collectively referred to herein as "Petitioners").

**I. THE COMMISSION CORRECTLY DETERMINED THAT ADOPTION OF SECTION 25.104 IS WITHIN ITS AUTHORITY**

The Commission concluded in the Order that preemption of local land-use regulation was necessary “to ensure that access to satellite services is available through wide use of earth station antennas.” Order at ¶ 15. Although it acknowledged the interests of local governments with respect to zoning issues, the Commission determined that the “very significant” federal interests at stake warranted preemption. Id. at ¶ 12.

Petitioners argue that the Commission’s action is inconsistent with Section 207 of the Telecommunications Act of 1996, which requires the Commission to preempt local restrictions that impair users’ ability to receive specified video programming services, and with limitations on federal authority under the Constitution’s Commerce Clause. In fact, however, the Commission correctly held that “nothing in the new legislation affects our broad authority to preempt state and local zoning regulations that burden a user’s right to receive all satellite-delivered programming.” Order at ¶ 16. Furthermore, because the Commission acted to protect users’ ability to access interstate transmission services, the preemption rule adopted is fully in accord with the Commerce Clause.

**A. The Commission’s Preemption Authority Is Not Limited by Section 207 of the Telecommunications Act**

The claims by the National League of Cities and Dallas that Section 207 restricts the Commission’s ability to preempt local zoning regulation of satellite antennas, see National League Petition at 2-7; Dallas Petition at 1-7, are

unfounded. These Petitioners note that Congress instructed the Commission to prohibit restrictions that impair a viewer's ability to receive video programming services using DBS, MMDS, or devices designed for over-the-air reception of television signals. Essentially these parties argue that because the preemption rule adopted by the Commission encompasses services not specified in Section 207 and addresses all regulations that "affect" satellite antennas, the Commission's action is contrary to the expressed intent of Congress.

The Petitioners, however, are clearly overstating the scope of Section 207. Although that provision requires the Commission to take preemptive action with respect to certain services, nothing in the Section suggests that Congress intended to circumscribe the Commission's discretion to implement broader measures. Thus, the new statutory mandate contained in Section 207 does not affect the Commission's pre-existing authority to preempt local regulations in order to further important federal objectives.

That authority is well-established. The Commission initially adopted Section 25.104 in 1986. As the Commission observed in the Order, not one of the courts that have considered the rule since that time has questioned the Commission's power to act in this area. Order at ¶ 13. To the contrary, the courts have consistently upheld Commission actions that preempted state regulation that interfered with satellite communications. Id. at ¶ 11 (citing cases).

The Commission's decision to modify Section 25.104 is clearly consistent with this precedent. The Commission did not, of course, rely on

Section 207 when it proposed to broaden the scope of Section 25.104, since it adopted the Notice in this proceeding<sup>2</sup> well before the Telecommunications Act was enacted. The Commission relied instead on its “responsibility to protect and promote the strong federal interest in widespread access to satellite communications,” noting that it was obliged to take steps to ensure wide availability to such services under the Communications Act, 47 U.S.C. §§ 151 & 705. Id. at 6994-6995.

Furthermore, Congress can be presumed to have been aware of both Section 25.104 and the Commission’s then-pending proposal to expand its scope at the time Congress was considering what became Section 207 of the Telecommunications Act. As the Commission noted, if Congress had wanted to preclude the Commission from preempting local regulation of services other than direct-to-home video, it could have done so, but it did not. See Order at ¶ 61.

The Commission’s conclusion that it retains authority to adopt a preemption rule broader in scope than what is mandated by Section 207 is clearly consistent with norms of statutory construction. Contrary to the argument made by the National League of Cities, the Commission’s interpretation of its powers does not render Section 207 superfluous. See National League Petition at 7. Section 207 requires the Commission to preempt regulation impairing the ability of users to access direct-to-home video services. Under the Commission’s reading of its

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<sup>2</sup> Notice of Proposed Rulemaking, Preemption of Local Zoning Regulation of Satellite Earth Stations, 10 FCC Rcd 6982 (1995) (hereinafter, “Notice”).

authority, it would have had discretion to take such action in any event, but would not have had an obligation to do so. Thus, the Commission's view still gives meaning to Section 207.

The adoption of Section 207 "evidences Congress's recognition that the federal interests at stake here warrant preemption of inconsistent state and local regulations, even when those regulations address a traditionally local subject such as land use." Order at ¶ 16 (footnote omitted). Thus, Section 207 supports, rather than undercuts, the Commission's decision to adopt a comprehensive preemption rule in the Order.

#### **B. The Order Is Consistent with the Commerce Clause**

The arguments of some Petitioners that the Commission exceeded the scope of its authority under the Commerce Clause, see National League Petition at 8-10; Dallas Petition at 7-11, are similarly without merit. Both parties rely heavily on the decision of the Supreme Court in United States v. Lopez, 115 S.Ct. 1624 (1995). However, the facts at issue in that ruling, which struck down a law that made it a federal crime to have a gun on the premises of a school, are far removed from the circumstances facing the Commission here.<sup>3</sup>

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<sup>3</sup> In fact, Dallas concedes as much. Dallas acknowledges that Lopez is a criminal case, whereas the Commission is dealing with economic regulation, which is the traditional focus of the Commerce Clause. See Dallas Petition at 7-8. See also Lopez, 115 S.Ct. at 1630-31 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.") (footnote omitted).

In any event, the Order clearly satisfies the standard set out in Lopez. There, the Court held that federal power under the Commerce Clause is limited to activities that “substantially affect” interstate commerce. Lopez, 115 S.Ct. at 1630. The Commission stated in the Notice that:

the evidence compiled in this record indicates that local zoning restrictions have inhibited access to satellite services for a substantial number of users, widely dispersed throughout the country. The obstacles faced by these users appear to have hampered the development of existing satellite services and impeded the growth of related industries such as programming and antenna manufacturing. Moreover, the record suggests that local restrictions currently in force are likely to have a similar effect on new satellite services as they are developed. Notice at 6995.

The Commission subsequently confirmed these findings in the Order. See Order at ¶ 23. This evidence clearly supports the conclusion that local zoning regulation of satellite antennas “substantially affects” interstate commerce.<sup>4</sup>

## **II. THE ORDER ACCOMMODATES THE LEGITIMATE CONCERNS OF LOCAL GOVERNMENT ENTITIES**

The complaints of Petitioners that the Order ignores valid local health, safety, and aesthetic concerns<sup>5</sup> are also unwarranted. To the contrary, the

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<sup>4</sup> Dallas suggests that the number of complaints regarding zoning rules is insignificant in comparison to the growth of the direct broadcast satellite industry. See Dallas Petition at 9. GE Americom believes that the receipt of at least a thousand complaints regarding zoning just in the last year (see Order at ¶ 21) shows a substantial impact on interstate commerce in numbers alone. More importantly, however, zoning restrictions on satellite antennas clearly have a substantial effect on the ability of any given prospective user to take advantage of interstate satellite services.

Commission took pains to accommodate these concerns within the limits of its mandate to ensure availability of satellite services.

The Commission explicitly rejected suggestions of GE Americom and others that it adopt a per se rule preempting all regulation of small satellite antennas. Order at ¶ 25. The Commission did so in deference to “[t]he comments filed by local government representatives demonstrat[ing] great concern about their continued ability to influence land uses in their communities.” Id. Instead, the Commission tailored its rule changes carefully to respond to local concerns. It adopted a presumption of unreasonableness only with respect to regulation of small antennas, and permitted rebuttal of that presumption upon demonstration of a reasonable safety concern. With respect to larger antennas, the Commission permitted reasonable health, safety or aesthetic regulations, provided they do not unduly burden users. The Commission also incorporated a waiver provision to address unique circumstances, such as architecturally historic areas. Id. at ¶ 26.

Thus, the Commission took into account the health, safety and aesthetic interests of local governments in fashioning its rule changes. These changes represent an appropriately balanced approach designed to achieve the federal objectives without unduly limiting the land use powers of local governments.

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<sup>5</sup> See National League Petition at 12-17; Boulder County Petition at 6-9; Florida League Petition at 1-2.

## CONCLUSION

The Order represents a necessary and appropriate means of promoting the critical federal interest in ensuring the availability of satellite services, while accommodating to the extent possible the concerns of local governments. The Commission should accordingly deny Petitioners' request for reconsideration of the Order.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 21st day of May, 1996, a copy of the foregoing Opposition of GE American Communications, Inc. was served by first class mail, postage prepaid addressed to the following:

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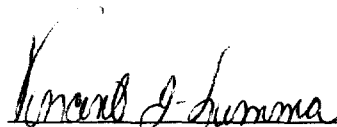
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